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Evidence--Res Gestae--Spontaneous Declarations

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EVIDENCE—RES GESTAE—SPONTANEOUS DECLARATIONS.—*D* was indicted for the murder of his father, tried, and found guilty of voluntary manslaughter. At the trial, a witness was permitted to testify to statements made by decedent, some thirty to fifty minutes after the alleged assault, naming *D* as his assailant. *D* objected to the admissibility of this testimony on the ground that it was hearsay and pursued this objection by writ of error to the Supreme Court of Appeals of Virginia. *Held*, that the statement made by decedent some thirty to fifty minutes after the alleged assault was not contemporaneous with the alleged assault and was not a spontaneous utterance at the time of the assault; that the statement was a narrative of a past, completed occurrence and was not admissible as part of the *res gestae*. *Kuckenbecker v. Commonwealth*, 101 S.E.2d 523 (Va. 1958).

The basis for admission of extrajudicial statements as part of the *res gestae* is that the stress and excitement of the thing being done provokes a declaration, relating to that event, with such spontaneity that reflection upon which falsehood is based is precluded. *Reynolds v. W. T. Grant Co.*, 117 W. Va. 615, 186 S.E. 603 (1936); 7 MICHIE'S JURISPRUDENCE OF VIRGINIA AND WEST VIRGINIA, *Evidence* § 259 (1949). Thus it must appear that the statement is not a mere narrative of a past completed event or made with deliberation or reflection upon the past event. *State v. Barker*, 128 W. Va. 744, 38 S.E.2d 346 (1946); 6 WIGMORE, *EVIDENCE* § 1750 (3d ed. 1940).

Though the statement need not be strictly contemporaneous with the exciting cause, it must be made within such time after and under such circumstances as will exclude the presumption that it is a result of deliberation. *State v. Baker*, 84 W. Va. 151, 99 S.E. 252 (1919). Since the veracity of the statement is attributed to the preclusion of reflection, spontaneity rather than contemporaneity is now the generally recognized test of admissibility. *Collins v. Equitable Life Ins. Co.*, 122 W. Va. 171, 8 S.E.2d 825 (1940); *Starcher v. South Penn Oil Co.*, 81 W. Va. 587, 95 S.E. 28 (1918). While the mere passage of time will not, in the presence of circumstances indicating otherwise, deprive the statement of its spontaneity, an indefinite showing of the time element may, in the absence of circumstances indicating otherwise, be controlling in determining that the statement is not part of the *res gestae*. See *e.g.*, *State v. Hicks*, 107 W. Va. 418, 148 S.E. 131 (1929); *State v. Johnson*, 107 W. Va. 216, 148 S.E. 4 (1929).

The presence or absence of facts, in particular cases, which tend to exclude the presumption of deliberation may to some extent account for the different results reached in cases where the time element was the same and to that extent resolve many of the apparent conflicting decisions. *State v. Withrow*, 96 S.E.2d 913 (W. Va. 1957). The mental and physical condition of the declarant is an important, if not controlling, consideration in determining whether a lapse of time has deprived the statement of its spontaneity. See *State v. Withrow*, *supra*; *State v. Hicks*, *supra*. The time element involved in a particular case cannot be disassociated from the other elements involved therein. So it is that no fixed time can be associated with the rule and the factual situation in each case will set a time limit peculiar only to that particular set of facts. *State v. Coram*, *supra*; 20 AM. JUR., *Evidence* § 663 (1939).

In the principal case the time of the alleged assault is not precisely fixed. Decedent, when discovered by the witness, was pale, breathing hard, and holding his hand on his chest. Decedent accompanied the witness into the lobby of the hotel and, after having conversed with the witness for a few minutes, made his statement of the alleged assault in response to an inquiry by the witness.

That the court was correct in holding that decedent's statement lacked the spontaneity required for its admission as part of the *res gestae* seems of little doubt. Though there is some evidence that decedent may have been experiencing pain resulting from the alleged assault at the time he made his statement, the failure to mention the assault immediately upon meeting the witness, the ability to carry on an intelligent conversation for a few minutes before making the statement, and the fact that the statement was made in response to a question by the witness are strong factors indicating that decedent's statement was not prompted by a spontaneous emotional reaction to the alleged assault; but that he was speaking with a deliberated calmness of a past completed event. These factors, considered in light of the fact that the statement was made within an indefinite period, some thirty to fifty minutes, after the alleged assault, appear to conclusively overcome any evidence presented to show that decedent continued to act under the stress and excitement caused by the alleged assault.

The statement and application of the *res gestae* rule by the West Virginia court has led to some confusion and apparent con-

flicting decisions. However, it is suggested that an analysis of the individual cases in light of all their individual facts may serve to clarify and perhaps resolve many of the apparent conflicts. See Hardman, *Spontaneous Declarations (Res Gestae)*, 54 W. VA. L. REV. 93 (1952), 56 W. VA. L. REV. 1 (1954).

It is submitted that our court, on the facts here present, would reach the same decision as did the Virginia court in the principal case.

J. D. McD.

LANDLORD AND TENANT — CONDEMNATION — TERMINATION OF LEASE.—*P*, the owner of a lot with a store building thereon, leased the premises to *D* for a two year term for the purpose of operating a business. The state highway department, desiring to widen the highway, condemned a major portion of the leased premises, including the part on which the store building was located. Both *P* and *D* were made parties to condemnation proceedings and were awarded damages for their respective interests. *P* offered to relocate the store building and continue the lease. Upon *D*'s refusal to continue the lease *P* brought this action for nonpayment of the rent. *Held*, that condemnation of the major portion of the leased premises terminated the lease, and with it reciprocal rights and obligations of the parties under such lease, including the landlord's right to rent. Affirmed. *Farr v. Williams*, 101 S.E.2d 483 (S.C. 1957).

It is surprising that a question of such practical importance as whether the appropriation of leased premises through eminent domain abates the payment of rent, should not have been definitely settled.

According to a majority of decisions, the taking of the entire premises by condemnation proceedings operates to release the tenant from liability to pay rent. See, *e.g.*, *Chrysoverges v. General Cigar Co.*, 163 La. 364, 111 So. 787 (1927); *Newark v. Cook*, 99 N.J. Eq. 527, 133 Atl. 875 (1926). There are perhaps only two decisions to the effect that it is no defense to the claim for rent that the whole premises have been taken for public use, it being considered that the covenant to pay rent remains operative in spite of the fact that the lessee no longer has any interest in the land. *Foote v. Cincinnati*, 11 Ohio 408 (1842); *Foltz v. Huntley*, 7 Wend. 210 (N.Y. 1831).